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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Joint Petition Of Consumer Federation Of America (CFA) And National Cable Television Association, Inc. (NCTA) For Rulemaking And Request For Establishment Of A Joint Board	)	RM-8221; DA 93-463

COMMENTS OF THE NYNEX TELEPHONE COMPANIES

New England Telephone and
Telegraph Company
and
New York Telephone Company

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Dated: May 21, 1993

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SUMMARY OF NYNEX TELEPHONE COMPANIES' COMMENTS IN RM-8221; DA 93-463: MAY 21, 1993

The NYNEX Telephone Companies oppose the petition by CFA/NCTA which requests the FCC to: freeze the existing video dialtone Section 214 application process; establish a Federal-State Joint Board to recommend procedures for separating the cost of local telephone company plant used jointly to provide telephone service and video dialtone; and launch an all-encompassing rulemaking on a myriad of purported issues involving Parts 32, 64, 36, 69 as well as price cap, ARMIS and joint marketing/customer privacy rules.

First, the petition is procedurally unsound. It is contrary to the careful regulatory framework the Commission recently established in its Video Dialtone Order. Moreover, petitioners merely utter the same points that have been raised and addressed, or are being addressed, in the video dialtone docket, reconsideration pleadings in that docket and/or the Section 214 application proceedings. Petitioners raise no new issue, and they have already been accorded multiple ample opportunities to be heard.

Second, as a further independent ground for rejection of the petition, the Commission should find that the petition raises no substantive issue worthy of a rulemaking at this time. We provide a sampling of items illustrating the petitioners' misconceptions of FCC rules and their baseless criticism of the FCC's system of regulatory safeguards.

In sum, the CFA/NCTA petition should be recognized as a transparent anticompetitive tactic and firmly rejected. The Commission should continue to follow its established regulatory framework with respect to video dialtone.

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COMMENTS OF THE NYNEX TELEPHONE COMPANIES

I. INTRODUCTION AND OVERVIEW

New England Telephone and Telegraph Company and New York Telephone Company (the NYNEX Telephone Companies or NTCs) submit these Comments pursuant to the Commission's Public Notice released April 21, 1993, in the above-captioned matter. That Public Notice invited comments on the above-referenced petition filed April 8, 1993, by CFA and NCTA (petition).

The petition requests the Commission to commence a rulemaking to establish separations, cost accounting and cost allocation rules for video dialtone service, and to establish a Federal-State Joint Board to recommend procedures for separating the cost of local telephone company plant used jointly to provide telephone service and video dialtone. The petition also requests the Commission to hold in abeyance the pending video dialtone Section 214 applications, and to refrain from accepting any new applications until the completion of the proposed rulemaking.

As discussed herein, the NYNEX Telephone Companies oppose the petition since it is procedurally and substantively devoid of merit. The petition is anticompetitive, contrary to FCC rules and policies, raises no new issues, and should be rejected.

II. THE PETITION IS PROCEDURALLY UNSOUND

The CFA/NCTA proposes a freeze be placed on the Commission's consideration and receipt of video dialtone applications while the Commission: 1) establishes a Federal-State Joint Board to recommend the proper allocation of plant used jointly for telephone and video transmission services; 2) adopts video dialtone-specific cost accounting rules to safeguard consumers and ensure fair competition; 3) determines the proper application of its access charge and price cap rules to video dialtone; 4) adopts procedures for separating the costs of regulated and nonregulated video dialtone services; and 5) adopts video dialtone-specific rules for joint marketing and customer privacy. The petition alleges (pp. 3, 6-7) that three video dialtone applications pending before the Commission have manifest flaws and raise new policy issues that must be resolved in an all-encompassing rulemaking now. The petition is procedurally baseless for the following reasons.

The petition is totally contrary to the following regulatory framework recently established by the Commission in its Video Dialtone Order:[1]

- Overall, the FCC's public interest goals are to develop an advanced telecommunications infrastructure, increase competition in the video marketplace and enhance the diversity of video services to the American public to promote consumer choice.[2]

- The FCC's regulatory framework for basic and enhanced services will apply: 1) local telephone companies can provide a basic platform on a nondiscriminatory common carrier basis;[3] 2) local telephone companies can offer enrichments to the basic service, including enhanced and other non-common carrier services.[4]

- Local telephone companies must file a Section 214 application for approval to offer common carrier facilities for the transmission of video programming.[5]

- Existing safeguards against discrimination and cross-subsidy in the provision of basic services by the local telephone companies, in conjunction with the requirement of a nondiscriminatory video platform, will effectively protect against potential anticompetitive conduct by local telephone companies providing video dialtone.[6]

- Existing safeguards with respect to nonregulated services are sufficient to protect against cross-subsidization concerns. "[T]he Commission presently has in place a comprehensive system of cost allocation rules and cost accounting safeguards designed to separate nonregulated service costs from regulated service costs.... [V]ideo dialtone is an evolution of the existing network.... [W]e stress

that our present safeguards are an appropriate starting point for the initial implementation of video dialtone."[7]

- The Commission will assess the adequacy of existing safeguards in the Section 214 authorization process as local telephone companies submit specific video dialtone proposals.[8]

- "While these issues [on Parts 32, 36, 64, 69, etc.] will doubtless require close consideration as video dialtone evolves, we find that, at present, changes to our rules in anticipation of video dialtone service proposals, other than those specifically adopted herein, are premature.... Further, because we believe that many important issues will arise only in connection with specific video dialtone proposals, we also decline to postpone the adoption of the video dialtone regulatory framework while the Commission or a Commission-sanctioned industry advisory committee considers and resolves all outstanding regulatory, technology and policy issues."[9]

- "[T]he evolutionary nature of video dialtone requires that we avoid premature service descriptions and regulatory classifications of such services.... [I]n recognition of the evolutionary nature of technology and the nascent status of services which could be offered by the local telephone companies and others in connection with video dialtone, we believe that a future review of our rules and regulatory framework is warranted. Consequently, beginning in three years from the effective date of this order, we will undertake a review of our rules and regulatory framework in order to reassess their continuing effectiveness in light of the actual development of video dialtone." [Emphasis added.][10]

Based on the above, it is clear that petitioners' arguments have already been presented to and properly acted upon by the FCC in its Video Dialtone Order. The FCC and

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7 Id. at para. 92.

8 Id. at paras. 89, 96, 117.

9 Id. at paras. 116-17.

10 Id. at paras. 60, 96. See also id. at para. 79.

Congress[11] wish to foster competitive alternative offerings in the video marketplace. Indeed, relatively few communities in the U.S. are subject to effective cable television competition.[12] The FCC's video dialtone initiative offers hope for an alternative video delivery mechanism. With the quick-paced, evolving technology underlying broadband networks, the Commission has appropriately chosen not to hold up progress by insisting that all its existing rules and safeguards be overhauled before proceeding.[13] If the Commission were to require a revamping of the rules prior to allowing video dialtone proposals to go forward, the public would be deprived of the benefits of this new alternative video delivery medium, and of new and advanced products and services. Such a revamping is unnecessary. It is diametrically opposed to the pro-competitive, high technology and pro-consumer goals of the Commission and Congress.

Accordingly, the petition should be seen for what it is: a blatant attempt by the cable television industry to delay and thwart the introduction of new competing services to give themselves additional time to grow their customer base.

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11 See Cable Television Consumer Protection and Competition Act of 1992.

12 Id. at Sec. 2(a)(2); Competition, Rate Deregulation And The Commission's Policies Relating To The Provision Of Cable Television Service, MM Docket No. 89-600, Report released July 26, 1990, para. 98; "Cable Firms Say They Welcome Competition But Behave Otherwise," Wall Street Journal, September 24, 1992, p. A1.

13 See also Video Dialtone Order at para. 117 and n. 295 ("the public interest is served by prompt implementation of video dialtone...").

The rules they suggest be reviewed apply only to telephone companies. The petitioners know that rulemaking, especially on the scale they propose, is a time consuming process. Consequently, to freeze the video dialtone Section 214 process pending such a needless rulemaking would be anticompetitive.

In addition, petitioners have raised the same issues in their pending reconsideration pleadings directed to the Video Dialtone Order.[14]

The arguments made in the petition have also been raised in the video dialtone Section 214 proceedings. For example, the Commission stated in its Order in the Bell Atlantic Section 214 proceeding:

> [W]e find that the concerns raised by NCTA, D.C. PSC and PaOCA regarding the allocation of video dialtone costs between regulated and nonregulated activities are premature, and provide no reason for delaying the proposed trial.... [W]e believe that our existing safeguards, in conjunction with the requirement that C&P offer non-discriminatory access to the basic platform, are adequate to protect against anticompetitive conduct by C&P.[15]

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14 See, e.g., NCTA Reply to Oppositions to Petition for Reconsideration, November 25, 1992, pp. 5-6, n. 15 and pleadings cited therein ("NCTA has explained in detail why the safeguards adopted by the Commission with respect to enhanced services cannot reasonably be relied upon to prevent cross-subsidization and discrimination with respect to video-related services.... NCTA also believes that the Commission must adopt uniform cost allocation and pricing guidelines applicable to the basic platform before it accepts specific video dialtone applications."); NCTA Opposition to Petitions for Reconsideration, November 12, 1992, n. 16; CFA and Center for Media Education Petition for Reconsideration, October 9, 1992, pp. 24-32; NCTA Petition for Reconsideration, October 9, 1992, pp. 7-9.

15 Section 214 Application of the Chesapeake and Potomac Telephone Company of Virginia, File No. W-P-C-6834, Order released March 23, 1993, paras. 14-15.

Petitioners make a weak attempt to portray themselves as raising "new evidence" and "fundamental issues" that arise from the pending video dialtone Section 214 applications,[16] which supposedly warrant a halt to the process and commencement of a comprehensive rulemaking at this time. However, petitioners merely assert the same points that have been raised and addressed, or are being addressed, in the video dialtone docket, reconsideration pleadings in that docket, and/or the Section 214 application proceedings. These points relate to fully distributed versus incremental costing, the proper allocation of costs between video dialtone and other telephone services, and the application of FCC accounting rules.[17]

In sum, the petitioners raise no new issue, and they have already been accorded multiple ample opportunities to be heard. The Commission should adhere to its decision to review such issues as raised in the petition in the context of specific video dialtone Section 214 applications, and in a subsequent comprehensive review. We agree with the Commission that:

> The desirability of certain rule changes which have been suggested by some commenters, such as changes to Part 36 and Part 69, would be better addressed in the context of a more comprehensive review of those rules rather than on a piecemeal basis in this proceeding.[18]

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16 Petition, n. 9 and p. 8.

17 Petition, p. 8.

18 Video Dialtone Order at para. 116.

It should again be highlighted that video dialtone proposals are in a stage of infancy, and the technology is variable and

"functional accounting" system designed for the recording of core financial data,[21] and that:

> [B]ecause of the anticipated effects of future innovations, the telecommunications plant accounts are intended to permit technological distinctions.... These accounts, then, are intended to reflect a functional and technological view of the telecommunications industry.[22]

Part 32 is not designed to be service-specific.[23] It is designed to accommodate new network technologies. Accordingly, there is no need to establish new main accounts under Part 32 for video dialtone.[24]

B. Part 64:

To the extent petitioners criticize Part 64 for relying upon Part 32,[25] their position is without foundation. Petitioners also reiterate (pp. 10, 12) their broadbrush assertion that the FCC's cost accounting safeguards are "obsolete" and "inadequate" and will not protect

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21 See 47 C.F.R. Secs. 32.1, 32.2, 32.12.

22 47 C.F.R. Sec. 32.2.

23 See 47 C.F.R. Sec. 36.1(h).

24 If required, new plant subaccounts and/or field reporting codes could be created within the current account structure to accommodate broadband (video dialtone) technology. To the same effect, there is no need to establish new revenue accounts for video dialtone. Any revenue tracking associated with video dialtone can be accomplished by establishing subaccounts and/or special purpose function codes within the current account structure.

25 Petition—Hatfield Report, p. 15.

ratepayers. Of course, this position has already been fully

[redacted] 26

- The petition states erroneously that telephone companies would be able to shift nonregulated costs associated with video dialtone ventures to basic ratepayers: "Cable and Wire Facilities and Central Office Equipment will be reallocated after three years."[34] The FCC requires that such network investment costs cannot be shifted from nonregulated to regulated absent a waiver.[35]

C. Part 36:

The petition (p. 11) requests the Commission to establish a Federal-State Joint Board "to determine[e] the proportion of video dialtone plant to be assigned to telephone service, and thereby subject to the separations process."

However, jurisdictional separations is designed to allocate regulated costs between the federal and state jurisdictions, not to allocate costs between the regulated and nonregulated categories.[36] The latter allocation is already accomplished via Part 64.

The petition also claims that Part 36 will result in a mismatch of jurisdictional revenues and costs; i.e., while

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33 (Footnote Continued From Previous Page)

nonregulated actual use turns out to be more than the projection, baseline undepreciated cost plus interest will be retroactively apportioned to nonregulated activities. CC Docket No. 86-111, Joint Cost Reconsideration Order, released October 16, 1987, 2 FCC Rcd 6283, para. 64.

34 Petition -- Hatfield Report, p. 19.

35 Docket 86-111 Reconsideration Order, supra, para. 70. (The waiver must show that the regulated sector needs the investment and that it cannot be obtained at less cost from another source.)

36 See 47 U.S.C. § 410(c); Classification of Inside Wiring Services for Accounting Purposes, FCC 90-208, Order released May 31, 1990, 5 FCC Rcd 3521, para. 25.

video dialtone revenues will be treated as interstate, the costs will be allocated 75% to intrastate.[37] The Commission has stated that "the basic video dialtone platform is presumptively an interstate service over which the FCC has exclusive jurisdiction."[38] However, the Commission also noted that "video dialtone facilities may be deployed in varying configurations and ... we may need to address the extent of our jurisdiction depending upon the particular configuration."[39] That is, intrastate services could also utilize video dialtone plant.

Petitioners misconstrue the requirements of Part 36 with respect to the costs of Cable and Wire Facilities and Circuit Equipment. First, Part 36 does not require allocation based on bandwidth when assigning the costs of Cable and Wire Facilities and Circuit Equipment to the various categories. The rules state that the categorization process is accomplished through an analysis of the underlying facilities and costs using engineering and accounting data. Second, Part 36 allocates costs into a number of categories and subcategories among which are Exchange Line and Wideband. The Wideband category includes Exchange Line Wideband costs and is directly assigned to a jurisdiction whenever feasible. Since video requires bandwidth greater than twelve or more voice grade channels, its costs can be appropriately assigned to Wideband

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37 Petition, p. 11.

38 Video Dialtone Order, para. 72.

39 Id. at para. 74.

and directly assigned to the appropriate jurisdiction. Thus, there will be no mismatch between costs and revenues as petitioners allege.

Petitioners' attempt to assign virtually all the costs of deploying fiber in the loop to video is inappropriate. Petitioners wrongly assume that the only reason for local telephone companies' deployment of broadband capabilities in the loop is to compete in the broadcast video market. Petitioners ignore emerging platforms such as ISDN which have numerous residence and business applications. The petition also ignores the fact the the FCC and State commissions have been moving towards a recognition of basic telephone service as more than POTS alone. Moreover, fiber technology reduces the cost of each loop when computed on a per channel basis. In other words, the NTCs are deploying fiber in the distribution network because it is a vital part of the infrastructure needed to provide ISDN and other high-technology services in addition to POTS, and because it is economically efficient.

D. Part 69; Price Cap Rules:

The petitioners (p. 18) are incorrect in their assumption that video dialtone costs would be subsumed in the access services provided to interexchange carriers, resulting in cross-subsidy.

First, as noted, the current Part 36 rules define a private line category (Wideband) which is directly identifiable

In light of the above, there is no need to establish a separate access charge category or price cap basket for video dialtone.

E. ARMIS:

The petitioners ask that the ARMIS reports be revised to specifically capture video dialtone costs. Specifically, they state that the reports should provide comparative detail on fiber and copper investment and expense.[41] To break out metallic and non-metallic costs on the ARMIS 43-04 Report, which provides separations (Part 36) and access (Part 69) details, would be meaningless and extremely difficult.[42]

Furthermore, there are two ARMIS reports which track fiber deployment, ARMIS 43-07 (Price Cap Infrastructure Report) and ARMIS 43-08 (Outside Plant (OSP) statistical data -- formerly part of Form M). The ARMIS 43-05 and 43-06 are Service Quality Reports and do not track fiber deployment.

Much of the fiber data tracked on these two ARMIS reports is very high level in nature, i.e. fiber sheath

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41 Petition, p. 20 n. 43.

42 See also Section C on Part 36 above. Separations is intended to reasonably split costs on a total study area basis. It uses broad averages of costs, and applies simplified procedures where "practicable and where their

kilometers - total and by type of cable (aerial, underground, buried, submarine, etc.) More specific data such as fiber terminations at customer premises for various transmission rates would be very difficult to track. That data is also competitively sensitive.

To track fiber deployment for video dialtone separately from other new telephone services carried over fiber, or from the OSP fiber rehabilitation program, would be extremely difficult, burdensome and costly to the NYNEX Telephone Companies. No need for such permanent regular reporting has been demonstrated. Of course, the Commission could always request fiber data on an as-needed basis.

F. Joint Marketing/Customer Privacy:

There is no need to adopt special limitations on the joint marketing of basic telephony and video dialtone services nor on the use of subscriber information as urged by petitioners (pp. 20-22).

The petition states the BOCs' video dialtone operations would have a particular advantage with respect to new arrivals in the community when they contact the BOC for telephone service. This argument completely ignores the fact that cable companies have the real advantage and are the monopoly provider of video services. The BOCs are new in the marketplace and will have the difficult task of building their client base by winning away customers from the cable companies who have provided cable service to them for years. Quite unlike the context of BOC joint marketing of telephone service

and CPE, the cable companies have the advantage and entrenched customer base and consumers must now be educated that there will be alternative providers of video services in the marketplace.

The petition also asserts that: the existing Customer Proprietary Network Information (CPNI) rules do not protect the privacy of customers; TV viewers should be allowed to select individual programs without fear that their viewing choices will be scrutinized by industry or government; and special rules should be applied. The CPNI rules[43] do protect a customer's right to privacy, including residence and small business subscribers identified in the petition. Here again, petitioners misconstrue FCC rules. CPNI is not released to nonaffiliate vendors without customer authorization. If anything, it is the cable companies who need to have special non-disclosure privacy rules placed on them as they have access to this customer information today and are not bound by CPNI-like privacy rules.

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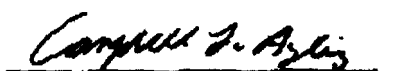
43 Adopted pursuant to CC Docket Nos. 86-79, 85-229, 90-623.

IV. CONCLUSION

As shown above by the NYNEX Telephone Companies, the CFA/NCTA petition for rulemaking is procedurally unsound and substantively without merit. It should be recognized as a transparent anticompetitive tactic and firmly rejected. The FCC should continue to follow its established regulatory framework with respect to video dialtone.

Respectfully submitted,

New England Telephone and
Telegraph Company
and
New York Telephone Company

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS OF THE NYNEX TELEPHONE COMPANIES in RM-8221 (DA 93-463), was served by first class United States mail, postage prepaid, on each of the parties indicated on the attached service list, this 21st day of May, 1993.

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